NO. 88-2107

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LEONARD J. JULIEN,

Petitioner.

versus

HENRY ZERINGUE, ZERINGUE'S FARM EQUIPMENT SERVICE and JOHN CLET LANDRY; and

THOMSON INTERNATIONAL, INC., LABADIEVILLE MACHINERY CO., INC., and ROBERT BOUDREAUX

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION OF THOMSON INTERNATIONAL CO.

JOHN M. COMAN, JR.
812 Gravier Street
1006 Hibernia Bank Bldg.
New Orleans, La. 70112
(504) 523-4737

Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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BRIEF IN OPPOSITION OF THOMSON INTERNATIONAL CO.

The plaintiff filed suit against the defendants alleging their sugar cane planters infringed his patent.

The Trial Court held there was no infringement under the doctrine of equivalents by the accused devices of defendants.

The United States Court of Appeals for the Federal Circuit basically affirmed the lower court's judgment. Additionally, the Federal Circuit sanctioned Appellant's Counsel under 28 U.S.C. 1927.

Mr. Leonard Julien then filed a Petition for a Writ of Centiorari.

STATEMENT OF THE CASE

- The Doctrine of Equivalents (Pennwalt) -

The lower court enunciated thirty-four (34) distinctive elements in Julien's claim which were not, nor their equivalent, present in the Thomson rotary drum planter. (TC's FF 48-82; Appen. G, pp. 13-18).

Julien argues that this "claim limitation" or "element-by-element" approach for the doctrine of equivalents is erroneous as a matter of law.

To support his position, Julien relies on the cases of *Graver Tank & Manufacturing Co., Inc. v. Linde Air Products,* 339 U.S. 605, 85 USPQ 328 (1950), *Martin v. Barber,* 755 F2d 1564, 225 USPQ 233 (Fed.Cir. 1985), *D.M.I., Inc. v. Deere & Co.,* 755 F2d 1570, 225 USPQ 236 (Fed.Cir. 1985), and *Hughes Aircraft Co., v. United States,* 717 F2d 1351, 219 USPQ 473 (Fed. Cir. 1983).

Julien argues that the above cases hold that the "invention-as-a-whole" approach is appropriate in applying the doctrine of equivalents.

However, this exact issue was directly addressed by the United States Court of Appeals for the Federal Circuit in its decision of January 5, 1989 (CAFC OP. 4, Appen. A):

> If a claim limitation or its substantial equivalent is not present, there can be no infringement. *Pennwalt Corp. v. Durand-Wayland, Inc.,* 833 F.2d 931, 934-35, 4 USPQ 2d 1737, 1939-40

(Fed.Cir. 1987) (in banc), *cert. denied*, 108 S.Ct. 1226 and 1474 (1988); *Lemelson v. United States*, 752 F2d 1538, 1551, 224 USPQ 526, 533 (Fed.Cir. 1985).

The CAFC did not erroneously misapply the doctrine of equivalents. The CAFC correctly held that the claim limitation approach is valid. The Court must compare each element of the claim with the accused device to determine whether the accused device contains each claim element or its substantial equivalent.

This is the *Pennwalt* precedent, which reiterated long standing infringement analysis case law.

Pennwalt is not an "unfortunate divergence."

Patents are necessary to protect the inventor who expends his time and money to advance an innovative concept.

However, a patent is a limited right.

The holder of a patent does not have the right to expand the elements of his claim to include non-equivalent elements. The different elements and operations of the accused device must be the equivalent of those elements disclosed in the patent. If not, there is no infringement.

The entire claim must be scrutinized. Every element (or combination of elements), or its substantial equivalent in the accused device must be present in the claim.

In *Pennwalt*, Judge Nies, in his "Additional View," produced a scholarly dissertation in his infringment analysis, including cases of the United States Supreme

Court, the Court of Claim' cases, and the United States Court of Appeals for the Federal Circuit's cases.

Judge Nies concluded that the Courts must "look at each element of the claim, that is, proceed through the claim element-by-element, and look for correspondence in the allegedly infringing device."

Therefore, the CAFC was not erroneous, as a matter of law, in upholding the Trial Court's element-by-element approach of the doctrine of equivalents.

- The Doctrine of Equivalents (*Graver)* -

Assuming arguendo, that the Graver application of the doctrine of equivalents is adopted, the results would not change.

Under *Graver,* for infringement, an accused device, as a whole, would have to perform substantially the same overall function or work in substantially the same way to obtain substantially the same overall result as the claimed invention.

The Julien planter requires cane grabs to open and close in some manner, thereby picking up and carrying the cane from the wagon to the trough.

The Zeringue and Thomson planters use "w" shaped rakes that stab, rake or sweep the cane down into the trough.

The rakes do not perform substantially the same overall function or work in substantially the same way to obtain substantially the same overall result as the Julien mechanical fingers.

Judge Collins held this in his Findings of Facts (TC's FF 456, 57, 58, 59, 60 and 61; Appen. G, pp. 14-15).

The CAFC affirmed this Finding when it pronounced:

> Julien has failed to convince us that the district court's findings are clearly erroneous.
>
> (CAFC OP. 4-5, Appen. A)

Mr. Julien did not obtain the first cane planter patent. However, his mechanical fingers on a planter were novel. Likewise, the rotary drum, push-gate and "w" shaped rakes of the Zeringue and Thomson planters were novel.

- Julien's Doctrine of Equivalents -

Although Julien promotes the doctrine of equivalents as expressed in *Graver,* his Petition For A Writ of Centiorari is void of specifics demonstrating how the accused planters perform substantially the same overall function or work in substantially the same way to obtain substantially the same overall result as the Julien planter.

The sole exception is that Julien, in his Writ of Centiorari, mentions that the Trial Court called defendants' cane engaging means "grabs" on eight occasions. (See Julien Brief, p. 5)

However, the Trial Court and the CAFC found defendant's cane engaging means to be rakes with rake functions, and not grabs with grab functions. A broom may be called a vacuum cleaner a hundred times, but this will never create a vacuum function in the broom.

- Sanctions Against Counsel -

The CAFC properly imposed sanctions against counsel as per its authority under 28 U.S.C. 1927.

SUMMARY OF ARGUMENT

The CAFC properly applied the doctrine of equivalents as confirmed in *Pennwalt.* Through the claim limitation or element-by-element approach, there is no infringement.

In the alternative, even if *Graver* was applied, and the accused device and the claimed invention were "viewed as a whole," there is still no infringement. The two planters do not perform the same overall function or work in substantially the same way.

CONCLUSION

For these reasons, a writ of centiorari should be denied.

Respectfully submitted:

John M. Coman, Jr.

JOHN M. COMAN, JR.
812 Gravier Street
1006 Hibernia Bank Bldg.
New Orleans, LA 70112-1406
(504) 523-4737

Attorney for Respondent